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No. 89-259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PETER DEMOSTHENES, Warden, Nevada State Prison,

Petitioner,

v.

JIMMY NEUSCHAFER,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT

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Attorney of Record

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STATEMENT OF THE CASE

On August 18, 1981, Neuschafer was an inmate in Unit 5 of the Nevada State Prison. Incarcerated with him in that unit was one Willard Taylor, also known as Johnnie Johnson. On August 18 Johnson was discovered wrapped in a sheet with a garrote or noose around his neck. He died the next day.

Neuschafer was indicted by the Grand Jury on February 8, 1982, for the murder of Willard Taylor.

Don Aimar and, later, Ronald Cauley, were appointed to represent Neuschafer.

On March 9, 1983, after a jury trial presided over by Judge Fondi, Neuschafer was convicted of First Degree Murder. On March 11, 1983, the jury fixed the penalty at death, finding as aggravating circumstances the facts that that Neuschafer had previously been convicted of murder, that Neuschafer was under sentence of imprisonment and that the murder involved torture and depravity of mind. The jury found no mitigating

circumstances. Neuschafer v. State, 101 Nev. 331 (1985).

On April 12, 1983, Neuschafer was formally sentenced to death. Neuschafer thereafter pursued his direct appeal to the Nevada Supreme Court. Oral argument was held on May 14, 1985. The Nevada Supreme Court thereafter affirmed Neuschafer's conviction and penalty on August 27, 1985. Neuschafer v. State, 101 Nev. 331 (1985). Remittitur issued from the Nevada Supreme Court on September 17, 1985.

On October 7, 1985, at a hearing with both Neuschafer and counsel, Linda Edmiston, present, the Court set an execution date of November 5, 1985. At that same hearing Ms. Edmiston was relieved as counsel. No new counsel was appointed.

On October 22, 1985, without counsel, Neuschafer filed his proper person petition for Writ of Habeas Corpus. It was assigned Case Number 85-1782H. He also filed a request for the appointment of counsel and for leave to proceed in forma pauperis. Neuschafer also requested a stay of his

execution. On the following day the State filed its Opposition to the Motion for Stay and its Motion to Dismiss the Petition.

On October 24, 1985, a hearing was held on the Motions and Petition. The Court provided Neuschafer, at that time, with copies of the State's Replies.

The trial judge denied the petition for Habeas Corpus without prejudice and denied the Request for Stay of Execution.

On October 28, 1985, the State Public Defender's Office filed a Motion for Stay of Execution on behalf of Neuschafer in the original proceedings. The affidavit filed in support thereof noted that Neuschafer had not had counsel to review the trial record and make a determination regarding issues that should be raised on post-conviction. The Public Defender asked for at least one hundred and twenty days to accomplish that review.

The State filed its Opposition to that Motion on October 29, 1985. At that time the State argued

that the State Public Defender acted without apparent authority to file such a motion as they had not been appointed and because there was no legal action pending. The State also noted that the Public Defender's office had conflicted off of Neuschafer's case early in the proceedings.

A hearing was held on October 30, 1985, on these motions. Present were two individuals from the Attorney General's office, Neuschafer and Mr. Robert Bork from the State Public Defender's office. In open court Neuschafer filed a request for appointment of counsel.

At that hearing the State argued that there was no basis for the appointment of counsel, analogizing to the situation in the previous habeas corpus case, No. 85-01721H. The Court found that the State Public Defender had a right to represent Neuschafer and did appoint them to do so.

Mr. Bork then argued that their main basis for a requested stay of execution was to enable their office to obtain the record and review it to see what issues might be present. He also noted that he was

at a severe disadvantage in this case as he could not cite any specific examples of ineffective assistance as his office had neither represented Neuschafer nor had had the time to review the record. Mr. Bork went on to note that while an extensive appellate brief had been filed, no ineffective assistance argument could have been raised at that time. Mr. Bork also noted that with the requirement under state law that all issues be raised at one time or be barred forever, his office would not be able, in the next five days, to review the file, prepare a petition and stop Neuschafer's execution. At this hearing the Court denied the Request for a Stay of Execution in Case No. C-46311. Mr. Bork then indicated his intention to file an appeal in the related post-conviction case, No. 85-01721H. The Court appointed the State Public Defender's office to represent Neuschafer in that case.

Also on October 30, 1985, Neuschafer filed a Notice of Appeal in Case No. 85-01721H, a

Designation of Record on Appeal and Request for Appointment of Counsel.

Mr. Bork, now appointed to represent Neuschafer on appeal, filed a Motion for Stay of Execution, which was denied by the court on the record, on October 30, 1987.

Mr. Bork also filed a Motion for Stay of Execution in the Nevada Supreme Court, on that same day.

On Friday, November 1, 1985, following the state holiday of October 31, 1985, the State filed its opposition.

That same day the Nevada Supreme Court, without briefs, held oral arguments. The Court then dismissed the appeal and denied the stay.

Later that day Neuschafer, with some assistance from the Federal Public Defender, filed with the United States District Court in Reno a petition for Writ of Habeas Corpus on regulation forms. Neuschafer raised only one issue, one that had been raised on direct appeal to the Nevada Supreme Court: the denial of his right to counsel

during interrogation. Neuschafer also filed a Motion for Appointment of Counsel and a Motion for Stay of Execution. The Court appointed the Federal Public Defender to represent Neuschafer on November 4, 1985. A hearing was set for 1:30 p.m. that date. At that hearing the issue of unexhausted claims and procedural issues were raised and discussed. At the conclusion of argument the Court granted the requested stay of execution. The Court also gave Neuschafer until November 25, 1985 to file an amended petition including all possible grounds which could be raised in federal court.

On November 25, 1985, Neuschafer's Supplemental Petition was filed in United States District Court. Thereafter the State filed its Answer.

On March 4, 1986, Neuschafer moved for an Evidentiary Hearing on the issues raised in his petition.

By Order entered March 12, 1986, the Petition was denied. By Minute Order on March 17, 1986, the Motion for Evidentiary Hearing was also denied.

Certificate of Probable Cause issued March 19, 1986.

Notice of Appeal was filed April 14, 1986.

On appeal to the Ninth Circuit Neuschafer raised the three issues raised at the federal district court level. After briefing and oral argument the Ninth Circuit remanded the case for an evidentiary hearing on the question of whether Neuschafer's confession was obtained according to the standards enunciated in Edwards v. Arizona, 451 U.S. 477 (1981). Neuschafer v. McKay, 807 F.2d 839 (9th Cir. 1987).

That evidentiary hearing was held on February 18, 1987. The District Court found that Neuschafer had initiated the questioned contact with the police and that his statements were voluntary and their admission did not involve a deprivation of Constitutional rights. Neuschafer v. Whitley, et al., 656 F.Supp. 891 (D. Nev. 1987). The Ninth Circuit again considered the matter and affirmed the decision of the district court,

Neuschafer v. Whitley, 816 F.2d 1390 (9th Cir. 1987).

After an aborted attempt by Neuschafer to seek a petition for certiorari in the United States Supreme Court, the Ninth Circuit filed and entered its mandate on July 9, 1987.

On July 21, 1987, all attorneys who had represented Neuschafer were notified of the hearing set for August 4, 1987, for issuance of Warrant of Execution. An execution date of August 20, 1987 was set. All counsel were relieved, after canvass of counsel and Neuschafer.

On August 5, 1987, Neuschafer filed a proper person petition for Writ of Habeas Corpus, Request for Appointment of Counsel and Request to proceed in Forma Pauperis. The State Public Defender was appointed to represent Neuschafer on August 5, 1987. On August 10, 1987, the Public Defender filed a Motion for Stay of Execution with supporting affidavit and Motion for order Shortening Time. In the supporting affidavit of counsel for Neuschafer, the Public Defender stated that neither she nor her

staff was familiar with the trial record and needed time to prepare a proper supplemental petition after such a review could be accomplished.

Also on August 10, 1987, the State filed its Motion to Dismiss the Petition and their own ex parte Motion for Order Shortening Time. On August 12, 1987, the State filed a Motion to transfer the case and its Opposition to the Stay. On August 14, 1987, Neuschafer filed his Opposition to the Dismissal Motion of the State. He noted that he had not had access to his trial record.

On August 17, 1987, the court held a hearing on the motions. The first order of business was the removal of the State Public Defender's office as Neuschafer's counsel. Neuschafer declined the offer to appoint other counsel.

At the conclusion of the hearing the court entered its Order dismissing the petition without prejudice and denying the stay of execution, still set for August 20, 1987. The following day, August 18, 1987, Mr. Powell of the State Public Defender's office filed a proper person Notice of Appeal on

behalf of Neuschafer, stating in his supporting affidavit that he believed Neuschafer was not competent to waive his right to appeal and to be represented by counsel. The record was transmitted to the Nevada Supreme Court. Mr. Powell then filed a Motion for Stay of Execution on August 18, 1987. The following day, August 19, 1987, the State filed its response. Later that same day the Nevada Supreme Court issued its Order dismissing the appeal and denying the request for stay of execution. Neuschafer was scheduled to die at approximately 2:00 a.m. August 20, 1987. In the evening hours of August 19, 1987, Neuschafer filed his second Petition for Writ of Habeas Corpus in U.S. District Court. He also obtained a Stay of Execution. The State sought unsuccessfully to have the stay lifted, both in the Ninth Circuit and in the United States Supreme Court.

Thereafter the State pleaded that Neuschafer had abused the writ in bring this second federal Petition for Habeas Corpus.

The Federal District Court Judge ordered that an evidentiary hearing be held on the issue of abuse of the writ. This hearing was held on November 20, 1987. At that time Neuschafer chose to present no new evidence, instead relying on the already voluminous record before the Court. During that hearing the State called Neuschafer as a witness. At that point Neuschafer's counsel, N. Patrick Flanagan, objected to Neuschafer's testifying pursuant to his right under the Fifth Amendment to the United States Constitution. After discussion and argument the Court ruled that a blanket assertion of Neuschafer's Fifth Amendment rights would not bar his testimony, although the objection could still be raised as to specific questions. Neuschafer was sworn in and refused to answer any questions.

After argument, the Court entered its Order granting the Motion to Dismiss the Writ on the ground of abuse of the writ.

On December 15, 1987, the Federal Public Defender filed a Motion for Rehearing and a Motion

to Withdraw as Counsel. Neuschafer thereafter also filed a request for Certificate of Probable Cause. The State opposed Neuschafer's Motions on December 24, 1987. By Order entered December 23, 1987, the Court denied the request for withdrawal of counsel and ordered Mr. Flanagan to file an affidavit. The Court also extended the stay of execution. Thereafter, Counsel filed his affidavit. On January 12, 1988, the Court denied the Motion for Reconsideration, granted a Motion for Certificate of Probable Cause and extended the Stay of Execution to February 12, 1988.

Thereafter Mary Boetsch was appointed to represent Neuschafer. A Notice of Appeal was filed February 1, 1988. It was amended February 22, 1988.

On February 17, 1988, Neuschafer's execution date was set for March 4, 1988.

On February 29, 1988, pursuant to Order of the Ninth Circuit, oral argument was held in Pasadena.

An Order thereafter issued, staying Neuschafer's execution and ordering simultaneous briefs.

SUMMARY OF ARGUMENT

The plurality opinion in Rose v. Lundy, 455 U.S. 509 (1982) left no unanswered question that requires a review of this case by this Court. The so-called unanswered question has long before been addressed by this Court and Congress.

The 9th Circuit was correct in this case on the facts of this case in finding that Neuschafer had not abused the writ. Neuschafer's conduct was completely consistent with the law as it stood at the time the first petition was filed in federal court, both in the 9th Circuit and in viewing the decisions of this Court and the intent of Congress.

The alleged conflict among the Circuits as to this issue is not as serious or as widespread as Petitioner purports. Two of the Circuits that Petitioner cites to, the 8th and the 10th, have not directly ruled on this issue. Moreover, application of the holdings in the cases cited to by Petitioner

from the 5th and 11th Circuits would produce the same result in this case, a finding that Neuschafer did not abuse the writ.

The need for finality of judgment does not outweigh the right of Neuschafer to have his constitutional claims reviewed in federal court on their merits. This is Neuschafer's second appearance in the federal system. The need for a second appearance was created by the State and State court decisions and cannot be attributed to Neuschafer.

ARGUMENT

I. THE NINTH CIRCUIT DECISION IN THIS CASE WAS CORRECT: NEUSCHAFER DID NOT ABUSE THE WRIT.

In 1963 this Court decided the case of Sanders v. United States, 83 S.Ct. 1068 (1963). Subsequently, Congress, in enacting and modifying 28 U.S.C. §2244 as well as Rule 9(b) of the Rules Governing §2254 Cases, adopted the reasoning and standards from Sanders v. United States. More importantly, Congress expressly rejected the more

liberal standard of inexcusable neglect and promulgated instead the more restrictive test of abuse. Rose v. Lundy, 455 U.S. 509, 533-534 (1982) (Brennan, J., concurring and dissenting).

As noted by Justice Brennan, Congress did not intend to forbid successive petitions unless there was abuse of the writ shown.

This is the law. Rule 9(b) and any alleged violations thereof can only be assessed in this context. Indeed, this Court has affirmed and endorsed this interpretation. Rose v. Lundy, 455 U.S. at 521, 533-34.

The Petitioner, State of Nevada, in seeking this review is asking this Court, not to overrule the Ninth Circuit in Tannehill v. Fitzharris, 451 F.2d 1322 (9th Cir. 1971), but in reality is asking this Court to effectively overrule itself, to distort or destroy the common sense meaning of Sanders and to completely ignore the clear intent of Congress.

On the facts of this case there simply can be no finding that Neuschafer's conduct was abusive, as Congress defined it. The issue of whether

Neuschafer abused the writ must be assessed by examining his conduct and frame of mind when the first petition was filed. Antone v. Dugger, 104 S.Ct. 962 (1984).

In this case Neuschafer, operating largely without the benefit of counsel, was facing imminent execution. No state court would grant him a stay of execution. The state Public Defender's office was not allowed any time to examine his file and present any and all claims in state post-conviction proceedings. Neuschafer had to proceed to federal court to save his life to obtain time to allow his claims to be heard.

At the time of that first filing Neuschafer and the Assistant Federal Public Defender, neither of whom had read the trial transcripts, proceeded with a clearly exhausted constitutional claim. After a hearing and very short continuance, the Assistant Federal Public Defender filed an amended petition listing the three claims that could be raised in Federal Court, those that had been raised on direct appeal to the Nevada Supreme Court, and were thus

exhausted. The continuance given to counsel was clearly insufficient to examine an entire trial transcript, and do the necessary investigation to establish any other claims, especially those involving any potential claim of ineffective assistance of counsel. Neuschafer v. Whitley, 860 F.2d 1470, 1481-82 (9th Cir. 1988) (Alarcon, J., concurring).

Moreover, had Neuschafer amended his petition to include claims unexhausted at the state level, the petition would have to have been dismissed as a mixed petition, Rose v. Lundy, 455 U.S. 509 (1982). Such a move would have put Neuschafer in precisely the same position he had been in shortly before: his execution would have been looming imminently on the horizon as Nevada law requires the setting of a new execution date between fifteen and thirty days after the date of the warrant for execution. NRS 176.495. He would have again been without counsel as appointment of counsel is discretionary. NRS 34.750. The state courts had already displayed a complete

unwillingness to give Neuschafer enough time and legal assistance to provide him with any meaningful collateral review.

Neuschafer did the only reasonable lawful thing he could do: he pursued his exhausted claims. In doing so, he followed the dictates of the federal judge precisely: he raised the only possible claims that he could raise in federal court, those exhausted at the state level.

Moreover, the decision of Neuschafer to proceed in this fashion was reasonable in light of the law in this Circuit at this time. Richmond v. Ricketts, 774 F.2d 957, 961 (9th Cir. 1985); Powell v. Spaulding, 679 F.2d 163, 165-166, n. 2 (9th Cir. 1982).

In this case, on these facts, the result reached by the Ninth Circuit was clearly correct: Neuschafer did not abuse the writ. Therefore, the petition for review sought by the State should not be granted.

II. THERE IS NO UNANSWERED QUESTION LEFT BY ROSE V. LUNDY WHICH REQUIRES RESOLUTION

Petitioner here asks this Court to answer the unanswered question left by Rose v. Lundy, 455 U.S. 509, 521, in the plurality opinion in Part III-C. We submit that any "question" left by this portion of that opinion has already been answered by this Court in Sanders v. United States, 83 S.Ct. 1068 (1963) and by Congress when it enacted and modified 28 U.S.C. §2244(b) and Rule 9(b) of the Rules Governing §2254 cases. The plurality opinion in Rose v. Lundy stated that any petitioner who deliberately set aside unexhausted claims and chose to proceed with exhausted claims only risked dismissal of subsequent petitions raising those claims. 455 U.S. at 521-522. This language is not mandatory. We submit that this is completely consistent with the law as it presently exists under the correct reading of Rule 9(b): each case must be examined on its own merits and facts to determine if any petitioner has acted with "abusive" motive. It may be that on the facts of any particular case a petitioner has acted with "abusive" motive in not

exhausting state claims prior to filing his first federal petition. If so, dismissal may then be warranted. Clearly it would be contrary to the intent of Congress to fashion a bright line rule that requires dismissal on abuse of the writ grounds for every successive petition that raises new issues not exhausted at the time of the first filing in federal court, yet that is precisely what Petitioner is asking this Court to hold. For this reason Petitioner's request for review should be denied.

III. CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE TO RESOLVE ANY ALLEGED CONFLICTS AMONG THE CIRCUITS AS NOT ALL CIRCUITS CITED TO HAVE RULED IN THIS ISSUE AND BECAUSE APPLICATION OF THE HOLDINGS OF THE CONFLICTED CIRCUITS WOULD PRODUCE THE SAME RESULT IN THIS CASE: THAT NEUSCHAFER DID NOT ABUSE THE WRIT

Petitioner also seeks review to resolve a perceived conflict among the circuits. Apart from the discussion above, wherein it is clear that the resolution sought by Petitioner would be contrary to this Court's decisions and the intent of Congress, it is also clear in closely examining the cases relied

on by petitioner that the conflict is not so compelling as to warrant review by this Court, especially as viewed in the factual context of this case.

The alleged conflict centers around two axes. First, although Congress clearly rejected the "not excusable" standard and opted for the "abusive" standard, some of those Circuits cited to by Petitioner have allowed the not excusable language and standard to creep back into their decisions. Liebman, James S., Federal Habeas Corpus Practice and Procedure, §26.6, pages 408-413 (1988).

The second centers around Part III-C of the decision in Rose v. Lundy, 455 U.S. 509, 520-522, discussed above.

In Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983) en banc, the Court held that unexhaustion, without more, is an insufficient reason to find no abuse of the writ. In addition to the problems with this Circuit's application of an incorrect standard, as discussed above, it is also clear that in applying the reasoning of the Fifth Circuit to the facts of this case

Neuschafer would prevail. Unlike the Petitioner in Jones v. Estelle, Neuschafer had a compelling reason for not exhausting all claims prior to the filing of the first federal writ. The Court in Jones v. Estelle noted that equitable principles are involved in abuse of writ cases and also notes that petitioner in that case had counsel through the proceedings and provided no explanation for failure to exhaust claims prior to his first filing in federal court. 722 F.2d at 163-165. In this case Neuschafer has provided a legal and reasonable explanation for failure to exhaust all claims prior to the first federal filing. Moreover, Neuschafer was not represented by competent counsel throughout these proceedings.

This is not a case where Neuschafer is chargeable with knowledge of unexhausted claims at the filing of the first petition; no one had been given enough time to peruse the record to find those claims.

In Rudolph v. Blackburn., 750 F.2d 302 (5th Cir. 1984) the Petitioner was aware of the Brady

issue raised in his second petition at the time of his trial. Petitioner intended to raise this claim in a federal petition. Petitioner chose not to wait to exhaust this claim in state court prior to filing in federal court. Clearly this case is factually distinguishable from Neuschafer's situation. Neuschafer did not choose to wait to bring any claim he had known about from the time of his trial. The need to survive to raise any claims in federal court impelled him to act as he did in this case. This can hardly be viewed as a deliberate choice within the rubric of Rule 9(b).

The decisions from the 8th Circuit cited by Petitioner simply do not support the conclusion sought to be drawn from them. In Purnell v. Missouri Department of Corrections, 753 F.2d 703, 710 (8th Cir. 1985) the Court noted nothing more than the language of the plurality opinion in Rose v. Lundy: that proceeding with only exhausted claims risks forfeiture. In addition to the interpretation of this language discussed above, it should also be noted that this observation is dicta, as the issue

before the Court was whether the State could effectively waive the exhaustion requirement.

In Dukes v. Wainwright, 769 F.2d 504 (8th Cir. 1985) the Court held that the petition at issue must be dismissed because it contained exhausted and unexhausted claims, pursuant to Rose v. Lundy. The Court did not decide the issue of what happens if the petitioner proceeds with only the exhausted claims. It merely noted the language from Rose v. Lundy discussed above, and potential ramifications for this petitioner. 769 F.2d at 506.

In Jeffers v. Sargent, 842 F.2d 1008 (8th Cir. 1988) the Court specifically declined to rule on whether what petitioner had done "constituted 'abuse of the writ under Rule 9(b)." 842 F.2d at 1010.

In summary the Eighth Circuit cannot be said to have adopted a position in examining these cases. Indeed, it has declined to rule on the issue now raised before this Court.

The Tenth Circuit, in the cases cited by Petitioner herein, also has not decided the issue

now presented. In both Smith v. Atkins, 678 F.2d 883 (10th Cir. 1982) and Jones v. Hess, 681 F.2d 688 (10th Cir. 1982), the Court held that mixed petiions must be dismissed, in accordance with Rose v. Lundy. In the former case, the matter was remanded to the District Court for a determination as to whether the claims raised had been exhausted. If the petition contained unexhausted claims, and it was not amended, then it would be dismissed. 678 F.2d at 885. In the latter case, the Court held that a mixed petition must be dismissed and noted the possible ramifications of not exhausting previously unexhausted claims prior to proceeding in federal court. 681 F.2d at 695.

The Eleventh Circuit, bound by the decisions of the former Fifth Circuit rendered prior to October 1, 1981, McCorquodale v. Kemp, 832 F.2d 543 (11th Cir. 1987) fn. 2 at 544, found Petitioner's failure to exhaust state remedies insufficient cause to avoid dismissal for abuse of the writ, under Jones v. Estelle, 722 F.2d 159 (5th Cir. 1983) en banc; and Rudolph v. Blackburn, 750 F.2d 302 (5th Cir. 1984).

There is a critical difference between those cases and the instant case however; Neuschafer is not chargeable with knowledge of the unexhausted claims at the time the first writ was filed; the record had not been studied to determine whether any such claims existed and he had had no time to do so. Neuschafer v. Whitely, 860 F.2d 1470, 1481-1482 (9th Cir. 1988) (Alarcon, J., concurring).

Finally, in Arango v. Wainwright, 716 F.2d 1353 (11th Cir. 1983) the Court there determined that the pending review of the denial of petitioner's writ would be held in abeyance pending the decision of the Florida state court in claims petitioner was at that time pursuing in state court. This case is clearly factually inconsistent with the present case. Moreover, the Court there did not rule on whether petitioner would be held to have abused the writ in a subsequent filing. That precise issue was not before the Court.

IV. NEITHER ANY NEED FOR FINALITY NOR THE ELIMINATION OF PIECEMEAL LITIGATION WILL BE SERVED BY GRANTING THE WRIT IN THIS CASE.

As discussed at length above, Neuschafer did not indulge in needless piecemeal litigation for any improper purpose in this case. Moreover, the interest in the finality of litigation cannot and should not outweigh the right of this individual to have the appropriate federal courts review his Constitutional claims, especially where, as here, Neuschafer's second trip was born of necessity. Sanders v. United States, 83 S.Ct. 1068, 1073 (1963).

CONCLUSION

The 9th Circuit decision in Neuschafer v. Whitley, 860 F.2d 1470 (9th Cir. 1988) was correct in finding that Neuschafer had not abused the writ.

This Court should not grant the petition in this case for any of the reasons given by Petitioner. The law articulated by this Court and enacted by Congress, as and when applied correctly, adequately addresses the issues presented here. Even applying the reasoning employed by the 5th and 11th

Circuits in their decisions cited by Petitioner, the result in this case, on these facts, would be the same: Neuschafer has not abused the writ. The writ of certiorari should not issue.

Respectfully submitted.

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No.:

October Term, 1989

PETER DEMOSTHENES, Warden
Nevada State Prison,

Petitioner,

vs.

JIMMY NEUSCHAFER,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of Washoe in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 416 Ridge Street, Reno, Nevada 89501.

I have served the within OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543, an original and FORTY (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

DAVID F. SARNOWSKI
Sr. Deputy Attorney General
State of Nevada
Capitol Complex
Carson City, Nevada 89710

JOHN K. VAN DE KAMP
Attorney General of the
State of California
JAY M. BLOOM
Deputy Attorney General
110 West A Street, Suite 700
San Diego, California 92101

UNITED STATES COURT
OF APPEALS
Ninth Circuit
Post Office Box 547
7th and Mission Streets
San Francisco, California 94101

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at Reno, Nevada, on the 1st day of September, 1989.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

DATED at Reno, Nevada, September 13th, 1989.

Mary E Boetsch
MARY E. BOETSCH

SUBSCRIBED and SWORN to before me
this 13th day of September, 1989.

Monique L Meinert
NOTARY PUBLIC in and for the
County of Washoe, State of Nevada

MONIQUE L. MEINERT
Notary Public - State of Nevada
Appointment Recorded in Washoe County
MY APPOINTMENT EXPIRES MAY 2, 1993